Supreme Court, U.S.
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No. 01-1120

In The

Supreme Court of the United States

DAVID MEYER, individually and in his capacity as president and designated officer/broker of TRIAD, INC., doing business as TRIAD REALTORS,

Petitioner,

vs.

EMMA MARY ELLEN HOLLEY, DAVID HOLLEY, MICHAEL HOLLEY, a minor, and BROOKS BAUER, individually and on behalf of the general public,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The record shows that this case is not the one described by petitioner in his petition, nor that described in the amicus curiae brief filed by the California Association of REALTORS® ("CAR"). In deciding whether to grant the writ of certiorari, this Court should consider the following additional material facts not included in petitioner's brief, but contained in the record in the court of appeals. *Holley v. Crank*, 258 F.3d 1127 (9th Cir. 2001); Petition Appendix ("Pet.App.") at 1. This is not a case of an "innocent" corporate officer/owner being held strictly liable under the Fair Housing Act based solely on his status. Instead, this case presents the unusual circumstances where a corporate officer/owner *and* real estate broker completely abdicated his responsibilities for supervising his real estate salespersons. Indeed, the record shows that petitioner delegated his corporate and broker duties to a salesperson whom petitioner himself was under a professional duty to supervise. Rather than breaking new ground on vicarious liability, as claimed by petitioner, the court of appeals applied well-established principles of agency to hold, on this record, that petitioner cannot escape liability as a matter of law, reversing the district court. The court of appeals remanded the case for further examination of the facts in the district court.[1]

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[1] As well as arising in part out of the district court's partial grant of Meyer's motion to dismiss as stated by petitioner, Pet. at 2 n.1, this appeal also arose out of the district court's grant of summary judgment in favor of Meyer. 258 F.3d at 1130; Pet. App. 3-4, 29-36.

A number of significant facts are missing from the petition and should be considered by this Court in making its decision. Those facts follow.

It is undisputed that petitioner David Meyer ("Meyer") was the sole California state licensed *officer/broker* of Triad, Inc. ("Triad") at the time of the alleged discriminatory housing practices. District Court Clerk's Record ("Record") 27 at 5-7, 20-21, 27-29, 35-37, 39-41, 111; Record 28 at 4-9. It is undisputed that Meyer was the only person at Triad whose professional qualifications enabled Triad to hold a corporate real estate broker's license. 258 F.3d at 1135; Pet.App. at 14; Record 27 at 5-7, 20-21, 27-29, 35-37, 39-41, 111; Record 28 at 4-9. It is undisputed that Meyer was the *president* of Triad at the time of the alleged discriminatory housing practices. Record 27 at 111; Record 28 at 5. It is undisputed that Meyer was the *sole shareholder* of Triad from approximately 1978 until at least February 1995. Record 27 at 114; Record 28 at 8-9. Although Meyer claimed that he had transferred his entire ownership interest in Triad to Grove Crank in February 1995, the court of appeals found that respondents had raised a genuine issue of fact whether Meyer was still the sole shareholder of Triad at the time of the discriminatory housing practices alleged in this case. 258 F.3d at 1133 n.4, 1136; Pet.App. 10-11, 16. It is undisputed that at the time of the alleged discriminatory housing practices, Grove Crank was a California real estate salesperson licensed under Triad's corporate broker's license, and the vice-president of Triad. 258 F.3d at 1133 n.4; App. 9-10 n.4; Record 23 at exh. D; Record 24 at 1-2.

Meyer admits that, as the designated *officer/broker* for Triad, he was responsible for ensuring that Triad agents were acting in a lawful manner, that they observed the standards promulgated by the California Department of Real Estate, and that members of the public were treated lawfully by them. 258 F.3d at 1135; App. 14; Record 27 at 125-126; Record 28 at 6. Meyer admits that, as the designated *officer/broker* for Triad, he was ultimately responsible for the activities of Triad. Record 27 at 136; Record 28 at 6. Meyer also admits that, as the *president* of Triad, he was ultimately responsible for the activities of Triad. Record 27 at 136; Record 28 at 6.

Meyer claims that between April 1995 and August 1998, which includes the time relevant to this case, he fulfilled his duties as designated *officer/broker* and *president* of Triad "through" Grove Crank. Record 27 at 127; Record 28 at 8. Meyer further admits that between April 1995 and August 1998, he did not review any Triad paperwork regarding finalized real estate transactions because he had delegated that responsibility to Grove Crank. Record 27 at 134; Record 28 at 8. But, Meyer failed to provide any training for Crank regarding the review of final transactions before he delegated that responsibility to Crank. Record 27 at 134; Record 28 at 8. In fact, during that same time period, Meyer did not provide any training regarding fair housing laws to any Triad staff nor does he recall anyone else providing such training. Record 27 at 135; Record 28 at 8.

Moreover, there is a question of fact in the record regarding what role Meyer played at Triad. In the district court, Meyer himself presented what could be construed

as conflicting testimony under penalty of perjury regarding that role. On May 15, 1998, Meyer signed a declaration under penalty of perjury submitted to the district court in opposition to plaintiffs' motion to add him as a defendant in the related case, stating that he "was formerly associated with Triad Inc." but has "not been involved in the day-to-day management of the business [Triad] since February of 1995" though "technically still an officer with the corporation." Record 27 at 142. Later, in his deposition in this case, Meyer admitted that he had an office at Triad which he used on a daily basis until sometime in 1997. Record 27 at 131-132; Record 28 at 7. He also admitted that he was involved in real estate transactions and received commissions through Triad between 1995 and 1998. Record 27 at 117-118, 133-134; Record 28 at 5.

REASONS FOR DENYING THE WRIT

According to Meyer, the question presented here is whether the federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("Title VIII"), diverges from well-established rules of agency law so that "owners and officers of corporations are absolutely liable for an employee's or agent's violation of the Act, whether or not they personally directed, authorized, or were even aware of the particular acts that occurred." Petition ("Pet.") at i. Meyer argues that the court of appeals decided an important question of federal law, holding that the Fair Housing Act "abrogates established rules of vicarious liability." Pet. at 5. The court of appeals' decision in this case does nothing of the sort.

This case involves the application of settled agency law principles to an unusual set of facts. Under the Fair Housing Act, as interpreted by the Department of Housing and Urban Development ("HUD") and the lower federal courts, a person may be held vicariously liable for discriminatory housing practices committed by employees or agents whom he directed or controlled or had the right to direct or control. That interpretation also comports with this Court's repeated guidance that the federal courts should look to the common law of agency to determine vicarious liability under the federal civil rights statutes. Applying those settled principles to this case, the court of appeals correctly found that the district court erred in ruling, as a matter of law, that Meyer could not be held vicariously liable for the discriminatory housing practices against respondents in this case.

Meyer asserts four specific reasons for granting the writ in this case. First, Meyer claims that the court of appeals incorrectly relied upon an outdated HUD regulation in construing the Fair Housing Act, creating a conflict with a decision of the Fourth Circuit. Pet. at 6. In fact, the court of appeals merely referred to the HUD regulation which is in harmony with established principles of vicarious liability under the Fair Housing Act. Second, Meyer argues that the court of appeals "misapplied the law" with respect to vicarious liability in a fundamentally significant manner that requires correction by this Court. Pet. at 13. In fact, the court of appeals applied well-established agency principles to the facts of the case. Third, Meyer maintains that the court of appeals' decision is an unwarranted expansion of the scope of liability under the Fair Housing Act. Pet. at 16.

In fact, the decision of the court of appeals is consistent with the decisions of other circuits applying well-established agency principles. Finally, Meyer urges that the issue presented by this case is of national importance. Pet. at 17. In fact, the court of appeals held only that, based upon the facts of record, Meyer could not escape liability under the Fair Housing Act as a matter of law and remanded for further proceedings. Upon examination, none of Meyer's assertions is meritorious or warrants the grant of certiorari by this Court.

Also significant to this Court's decision to deny the writ should be the fact that Meyer fails to address the court of appeals' third basis for finding him potentially liable – Meyer's role as the sole designated *officer/broker* of Triad, whose professional qualifications and agreement to supervise the Triad real estate salespersons served as a requirement for the State of California's licensure of Triad. 258 F.3d at 1134-35; App. 12-15. Meyer's duties and supervisory role at Triad as *officer/broker* were vital to the court of appeals' decision that he had the right to direct and control the conduct of the Triad salespersons. Because of Meyer's special role at Triad and the combination of his positions as *officer/broker*, *president* and *sole owner* of a small real estate office, this case utterly fails to present the issues raised by Meyer concerning the imposition of strict liability on "innocent" corporate officers and owners under the Fair Housing Act. Accordingly, the grant of certiorari in this case would be inappropriate and the petition should be denied.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY LOOKED TO HUD'S ADMINISTRATIVE REGULATIONS FOR GUIDANCE IN INTERPRETING THE FAIR HOUSING ACT IN THIS CASE.

Meyer claims that the court of appeals erroneously relied on an outdated and inapplicable HUD regulation to interpret the criteria for vicarious liability under the Fair Housing Act. Pet. at 9-12. Although the court of appeals looked to former 24 C.F.R. section 103.20(b) (1999) for guidance in determining who may be liable under the Fair Housing Act, it acknowledged that the regulations had been revised by HUD in 1999. 258 F.3d at 1131, n.1; Pet.App. at 5 n.1. That revision, however, did not affect the court's proper analysis.

The Fair Housing Act prohibits discrimination in the sale or rental of a dwelling on account of race, color, religion, sex, handicap, familial status or national origin. 42 U.S.C. § 3601, *et seq*. In enacting the Fair Housing Act, Congress did not define or limit the category of persons who could be found liable for discriminatory housing practices. For example, the provisions of 42 U.S.C. section 3604 state that "it shall be unlawful" to engage in certain discriminatory housing practices, and section 3605 makes it unlawful "for any person or other entity whose business includes engaging in residential real estate-related transactions" to engage in discriminatory housing practices. The stated policy of the Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This

Court has repeatedly emphasized that the Fair Housing Act must be given a "generous construction" in order to carry out a "policy that Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211, 212, 93 S. Ct. 364, 34 L.Ed.2d 415 (1972). *See also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731, 115 S. Ct. 1776, 131 L.Ed.2d 801 (1995) (the Fair Housing Act has a "broad and inclusive" compass and is accorded a "generous construction").

Congress has given HUD the authority and responsibility for administering the Fair Housing Act. 42 U.S.C. § 3608(a). Accordingly, HUD's construction of the statutory scheme it is entrusted to administer is accorded considerable weight. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). In conjunction with the passage of the Fair Housing Amendments Act of 1988, Congress charged HUD with making rules for carrying out the Fair Housing Act. 42 U.S.C. § 3614a; Pub.L. 100-430, 102 Stat. 1619. Pursuant to that authority, HUD has developed regulations and guidelines interpreting the Act. 42 U.S.C. § 3614a; 24 C.F.R. part 100, subchapter A.

At the time of the occurrence of the discriminatory housing practices alleged in this case, as well as at the time plaintiffs filed their complaint against Meyer in the district court, HUD regulations for the filing of administrative complaints provided:

> (a) A complaint may be filed against any person alleged to be engaged, to have engaged, or to be about to engage in a discriminatory housing practice.

> (b) A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale, rental, advertising or financing of dwellings or the provision of brokerage services relating to the sale or rental of dwellings if that other person, acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. § 103.20 (1999) ("Persons against whom complaints may be filed").

Meyer correctly quotes from HUD's comments accompanying the publication of the final rule, codified at 24 C.F.R. section 103.20, stating that HUD did not intend to impose strict liability on any principal, but intended to follow the law "enunciated by the courts in recent Fair Housing Act cases with respect to the liability of a principal for acts of an agent." Accordingly, HUD revised its proposed rule to state that a complaint may be filed against a directing or controlling person with respect to the discriminatory acts of another if the other person was acting within the scope of his or her authority as employee or agent of the directing or controlling person. 53 Fed.Reg. 24184, 24185 (1988); 24 C.F.R. § 103.20(b).

Meyer nonetheless claims that former section 103.20 has no application to this case, even as a starting point, because it is directed at HUD administrative complaints, rather than direct federal court actions. Pet. at 10-11. Although the case at bar is a direct civil action filed under 42 U.S.C. section 3613, HUD's interpretation of the requirements for filing an administrative complaint

under 42 U.S.C. section 3610 is significant. This Court has previously held that section 3610 providing for an administrative action, and former section 3612 (now section 3613) providing for a direct court action, provide different paths to the same remedies to the same prospective plaintiffs. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 105-108, 99 S. Ct. 1601, 60 L.Ed.2d 66 (1979). In *Gladstone*, this Court discussed at length that the two remedies were parallel and concluded that "[t]he most plausible inference to be drawn from Title VIII is that Congress intended to provide all victims of Title VIII violations two alternative mechanisms by which to seek redress: immediate suit in federal district court or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail." 441 U.S. at 104. Thus, HUD's interpretation of who may be a proper party defendant in an administrative proceeding under the Fair Housing Act, as set forth in 24 C.F.R. section 103.20, has relevance to the determination of who may be a proper defendant under the Fair Housing Act in a civil action in federal court.

Meyer also argues that the court of appeals should not have considered section 103.20 because it was amended by HUD in 1999 and was no longer in effect at the time of the decision of the court of appeals. Pet. at 9-10. Meyer claims that the former regulation was improperly considered because "[t]he new regulations completely abolished any reference to liability of 'any person' with 'the right to direct or control the conduct of another person' with respect to housing, and in so doing eliminated the very language relied on by the court of

appeals to support its decision." Pet. at 10. Meyer is mistaken.

The court of appeals did not err in looking to former 24 C.F.R. section 103.20(b) for guidance in construing the Fair Housing Act. Absent any indication that HUD intended to narrow the scope of liability, the court of appeals found the regulation instructive. 258 F.3d at 1131 n.1; Pet.App. at 5 n.1. In fact, HUD expressed no intention to limit liability when it amended its regulations in 1999. To the contrary, the Findings and Certifications section of the interim rule publication specifically states that "[t]he rule does not make substantive changes to the regulations." 64 Fed.Reg. 18538, 18539 (Apr. 14, 1999).[2] The interim rule was adopted as a final rule on August 27, 1999. 64 Fed.Reg. 46843 (Aug. 27, 1999).

The court of appeals did not err in finding former 24 C.F.R. section 103.20(b) instructive. Moreover, even if the regulation had no application, the analysis employed by the court of appeals applies federal common law agency principles and comports with similar decisions by other courts of appeals, as discussed in Part II below.

Similarly, Meyer's claim that the court of appeals' reliance on section 103.20(b) has created a conflict in the

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[2] The "direct or control" language formerly in section 103.20(b) was moved to revised section 103.202 entitled "Notification of respondent; joinder of additional or substitute respondents," which provides for the service of notice of any fair housing complaint "on any person who directs or controls, or who has the right to direct or control, the conduct of another person who is involved in a fair housing complaint." 64 Fed.Reg. at 18540-41; 24 C.F.R. § 103.202(b) (2002).

circuits should be rejected. Although a divided panel of the Fourth Circuit found that section 103.20(b) had no application in deciding who could be sued for discriminatory housing practices in a direct action in federal court, that decision was in contravention of this Court's opinion in *Gladstone*, 441 U.S. at 104. *Walker v. Crigler*, 976 F.2d 900, 904 (4th Cir. 1992). Even if a true conflict existed, it would be very tangential to the issues in this case and would not justify the grant of certiorari. *See Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 392, 43 S. Ct. 422, 67 L.Ed. 712 (1923) (certiorari reserved for cases in which there exists "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals").

II

EVEN IF THE HUD REGULATION HAD NO APPLICATION, THE COURT OF APPEALS APPLIED, AND STAYED WITHIN THE BOUNDS OF, WELL-SETTLED PRINCIPLES OF VICARIOUS LIABILITY IN THIS CASE.

Meyer claims that the court of appeals has construed his liability under the Fair Housing Act in a manner that "abrogates established rules of vicarious liability," which resulted in an unwarranted expansion of liability under the Act. Pet. at 5, 7, 12, 16. Meyer further posits that this case presents an important issue of federal law. None of these contentions has merit.

Although this Court has not decided the scope of vicarious liability under the Fair Housing Act, it has construed vicarious liability under other federal civil

rights laws by looking not to state law, but to the common law of agency as set forth in the Restatement (Second) of Agency (1958) ("Restatement"). *See, e.g., Kolstad v. American Dental Ass'n*, 527 U.S. 526, 527, 119 S. Ct. 2118, 144 L.Ed.2d 494 (1999) (looking to Restatement as starting point in construing Title VII punitive damages liability); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754-55, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998) (looking to Restatement as starting point in construing Title VII employer vicarious liability); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392, 102 S. Ct. 3141, 73 L.Ed.2d 835 (1982) (relying on Restatement in discussing vicarious liability under 42 U.S.C. § 1981). The Court has also used the Restatement to construe agency-related issues with respect to other federal statutory schemes. *See, e.g., Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S. Ct. 2166, 104 L.Ed.2d 811 (1989) (relying on Restatement of Agency to construe "employee" under Copyright Act of 1976); *Cf. Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-24 & n.3, 112 S. Ct. 1344, 117 L.Ed.2d 581 (1992) (relying on *Reid* to apply traditional agency principles to construe "employee" under ERISA).

Consistent with that approach, the lower federal courts have held that whether an agency relationship exists for purposes of the Fair Housing Act is determined by looking to federal, not state, law. *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) (relying on federal law of agency under Fair Housing Act); *Cabrera v. Jakabovitz*, 24 F.3d 372, 386 n. 13 (2d Cir. 1994) (same); *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1097 (7th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S. Ct.

2961, 125 L.Ed.2d 662 (1993) (same); *Marr v. Rife*, 503 F.2d 735, 740 (6th Cir. 1974) (same).

In interpreting who may be vicariously liable for violations of the Fair Housing Act under common law agency principles, federal courts have found liability under the doctrine of respondeat superior against many different types of defendants for the acts of their agents or employees, including property owners, real estate brokers, property managers or supervisors and corporate officers. *See, e.g., Cabrera v. Jakabovitz*, 24 F.3d at 385, 388 n. 16 (property owners liable for brokers' discrimination); *United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992), *cert. denied*, 510 U.S. 812, 114 S. Ct. 58, 126 L.Ed.2d 28 (1993) (apartment owner liable for discriminatory acts of his property manager); *City of Chicago v. Matchmaker*, 982 F.2d at 1096-97 (real estate brokerage firm liable for racial steering by its agents; owner and chief executive officer of firm personally liable); *Marr v. Rife*, 503 F.2d at 741-42 (proprietor of real estate brokerage firm personally liable for discriminatory acts of his sales agent); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975) (owners and property supervisors liable for discriminatory acts of rental agents); *Sanborn v. Wagner*, 354 F. Supp. 291, 295 (D. Md. 1973) (real estate broker doing business as a real estate brokerage company liable for the discriminatory acts of company sales agent); *United States v. Mitchell*, 335 F. Supp. 1004 (N.D. Ga. 1971), *aff'd, United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826, 94 S. Ct. 131, 38 L.Ed.2d 2159 (1973) (real estate brokers liable for discriminatory acts of their salespersons).

In imposing liability, the lower federal courts have focused on the nature of an agency relationship – the right of the principal to direct and control the agent. Under common law principles of vicarious liability, as set forth in the Restatement, "[a]gency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement § 1. A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service." Restatement § 2. Key to the Restatement definitions of principal-agent and master-servant relationships is that the principal and master *control or have the right to control* the conduct of the agent and servant.

This important principle has been long recognized in Fair Housing Act litigation. *See, Cabrera v. Jakabovitz*, 24 F.3d at 387 (sufficient evidence of agency where landlords controlled relations with brokers); *City of Chicago v. Matchmaker*, 982 F.2d at 1098 (chief executive and sole owner of real estate firm liable where he supervised the day-to-day operations of firm and agents); *Marr v. Rife*, 503 F.2d at 742 ("[a]s owner of the agency, Rife had at least the power to control the acts of his salesmen").

The Restatement further provides that a master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement § 219. Moreover,

> [a] master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion.

Restatement § 216 ("Unauthorized Tortious Conduct"). The comment to section 216 elaborates:

> A principal is often subject to liability for the unauthorized conduct of an agent with respect to matters which, under the agreement creating the relation, he has the right to direct. . . . [L]iability is normally based upon the fact that the tort is brought about in the course of an undertaking for the benefit, and subject to the right, of the principal to control his servant or other agent.

Restatement § 216 comment (a). The Second Circuit has pointed out the need for such a rule under the Fair Housing Act, stating that "[i]t would be too easy for the broker or owner to plead ignorance when an agent was caught and it would be unfair to only punish a manager or agent for what the owner or employer should have controlled and trained the employee to avoid." *Cabrera v. Jakabovitz*, 24 F.2d at 389 (quotation omitted).

In this case, the court of appeals applied similar agency principles. Meyer admits that he has ultimate responsibility for the activities of Triad, but claims he performed his duties as corporate *president* and designated *officer/broker* "through" Grove Crank, whom plaintiffs allege committed the discriminatory housing

practices.[3] Record 27 at 127; Record 28 at 8. In its opinion, the court of appeals found that Meyer may be subject to liability under the Fair Housing Act in his capacities as *sole owner* of Triad, *president* of Triad, and as the designated *officer/broker* of Triad. 258 F.3d at 1135-36; Pet.App. at 16. The court of appeals based its decision on each of these three bases for liability on Meyer's right to control the activities of the Triad salespersons – not on the basis of strict liability as Meyer claims. Although in its opinion the court of appeals used the term "non-delegable" in describing the duty not to discriminate in violation of the Fair Housing Act, it is clear that each of its findings was made on the ground that there was sufficient evidence of an agency relationship between Meyer and Crank and the Triad salespersons based on Meyer's right to direct or control their activities. Thus, Meyer's claim that the court of appeals used a non-delegable duty analysis as a means by which to escape the confines of vicarious liability is meritless. (Pet. at 7, 15.)

With respect to liability for discriminatory housing practices based upon his role as the *sole owner* of Triad, the court of appeals held that "[i]f Meyer solely owned the agency, he had at least the authority to control the acts of his salespersons, particularly in light of his position as president and officer/broker of Triad." 258 F.3d at 1133; Pet.App. at 10-11. In so holding, the Ninth Circuit followed similar decisions by the Seventh, Sixth and Fourth Circuits imposing liability on the sole owners of

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[3] Meyer also claimed that Grove Crank was the owner of Triad at the time of the discriminatory housing practices, which plaintiffs contest. 258 F.3d at 1133 n.4; Pet.App. at 9 n.4.

real estate brokerage firms – corporate and sole proprietorships – and found that "[t]he overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again." 258 F.3d at 1132; Pet.App. at 7. *See City of Chicago v. Matchmaker*, 982 F.2d at 1096-98; *Walker v. Crigler*, 976 F.2d at 904-905; *Marr v. Rife*, 503 F.2d at 742. Thus, the court of appeals correctly found that the district court had erred in holding that Meyer, as a matter of law, could not be liable in his capacity as *sole owner* of Triad.

With respect to liability for discriminatory housing practices based upon his role as the *president* of Triad, the court of appeals held that "as an officer of the company he actually did direct or control, or had the right to direct or control, the conduct of the salespersons who allegedly discriminated against the Holleys with respect to the sale of real estate." 258 F.3d at 1133; Pet.App. at 11. In his petition, Meyer seeks to frame the issue of corporate officer liability before this Court as a simple choice between strict liability versus liability only for acts of discrimination personally committed by a corporate officer. Pet. at 7, 12-15.

Meyer further contends that a finding of liability against him in his status as *president* of Triad would require the imposition of strict liability on him merely because of his status since plaintiffs fail to allege that he had any personal involvement in the alleged discrimination. Pet. at 7. Amicus curiae CAR makes a related claim that the court of appeals' opinion "has interpreted the policy of the fair housing law to state that an innocent person should be held responsible for violations of the

fair housing law solely due to that person's ownership in a corporation or that person's position as a corporate broker-officer under state licensing law." Brief of Amicus Curiae CAR ("Amicus Brief") at 7. CAR claims that "[p]ublic policy dictates that [the corporate structure] be permitted to continue in form and substance in the absence of an overriding wrong, *such as when the owner or officer of the company commits or authorizes misconduct or established policies that allow such misconduct to flourish.*" Amicus Brief at 8-9 (emphasis added). None of these arguments has any merit in this case.

Meyer claimed that he was exercising his duties as *president* of Triad "through" Grove Crank. Record 27 at 127; Record 28 at 8. As described more fully below, as the designated *officer/broker* of Triad, Meyer had duties of supervision and control over the activities of the Triad salespersons. *See* Part III below. Meyer's complete abdication of his duty to supervise the sales activities of the Triad salespersons is not "non-involvement" with the alleged acts of discrimination as he claims. Moreover, even the cases cited by Meyer state that actionable wrongful conduct of an officer may include an omission. Pet. at 13. *See Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 907 (1st Cir. 1980) (corporate officer liability may be imposed based upon act of omission); *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 409 (10th Cir. 1958) (same). *See also Hagemeyer Chemical Co., Inc. v. Insect-O-Lite, Inc.*, 291 F.2d 696, 699 (6th Cir. 1961) (officers, directors and shareholders of a corporation may be held liable for acts of agent of corporation if there was passive participation in conduct). In this case, Meyer's act of omission was his utter failure to supervise, direct and

control the activities of Triad's salespersons as required by the real estate licensing laws. Meyer also failed to set policies regarding fair housing training and compliance, which could certainly be found to "allow such misconduct to flourish" as described by CAR. Here, Meyer and CAR fail to address the fact that this case involves a professional real estate corporation and that Meyer had professional duties as the designated *officer/broker*, which distinguishes it from a lawsuit against typical corporate officers seeking to hold them personally liable for the acts of the corporation's employees. As described below in Part III, Meyer undeniably had the duty to direct and control the Triad salespersons in his position as designated *officer/broker* of Triad.

Thus, Meyer's claim of being held strictly liable as an "innocent" corporate officer is simply not borne out by the facts of this case. The court of appeals correctly found that the district court had erred in holding that Meyer, as a matter of law, could not be liable in his capacity as *president* of Triad. These facts bring this case squarely within the Restatement's provisions regarding common law vicarious liability.

III

THE PETITION SHOULD BE DENIED BECAUSE IT DISREGARDS THE OTHER SIGNIFICANT BASIS FOR THE COURT OF APPEALS' DECISION – MEYER'S ROLE AS THE DESIGNATED OFFICER/BROKER OF TRIAD.

As mentioned above, the court of appeals' decision that Meyer may be found liable under the Fair Housing Act also rests on his position as the designated *officer/*

broker of Triad under the California licensing scheme. 258 F.3d at 1134-35; Pet.App. 12-15. Specifically, the court of appeals held that "Meyer's undisputed responsibility to supervise Triad's salespersons in real estate transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." 258 F.3d at 1135; Pet.App. at 14.[4]

Meyer's professional broker qualifications and agreement to supervise the Triad real estate salespersons in his role as designated *officer/broker* served as the basis for the State of California's licensure of Triad. *See* Cal. Bus. & Prof. Code §§ 10130, 10131, 10159.2, 10211 and Cal. Code of Reg. 2725, the text of which is reproduced in the Appendix hereto. According to the California licensing scheme, the corporate officer designated by a corporate broker licensee pursuant to California Business and Professions Code section 10211

> shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

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[4] Although the court of appeals reviewed the California licensing scheme, it made clear that it was applying federal agency law, not California licensing law, to determine liability in this case. 258 F.3d at 1134; Pet.App. at 12.

Cal. Bus. & Prof. Code § 10159.2; App. at 3. Without a licensed officer of a corporation – in this case Meyer – the corporation cannot perform activities requiring a real estate broker's license. *Amvest Mortgage Corp. v. Antt*, 58 Cal.App.4th 1239, 1243 & n. 4, 68 Cal.Rptr.2d 457 (1997).

The California Code of Regulations implementing the Business and Professions Code sections regarding real estate brokers and salespersons, further requires that

> [a] broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage: (a) [t]ransactions requiring a real estate license; . . . (f) familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.

10 Cal. Code Reg. § 2725; App. at 4-5. The broker must also "establish a system for monitoring compliance with such policies, rules, procedures and systems." *Id.* Although a broker is allowed to use the services of brokers and salespersons to assist in administering such policies and systems, the broker may not "relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker." *Id.*

As the court of appeals correctly found, "Meyer may have neglected his duties to supervise salespeople in their real estate transactions, which included his responsibility to ensure that they follow federal and state anti-discrimination laws." 258 F.3d at 1134; Pet.App. at 12. The facts of this case show that "Meyer's undisputed responsibility to supervise Triad's salespersons in real estate

transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling." 258 F.3d at 1135; Pet.App. at 14. That undisputed responsibility also puts him squarely within the Restatement's definition of master as one who "controls or has the right to control the physical conduct of the other in the performance of the service." Restatement § 2. Thus, the vicarious liability imposed in this case rests firmly on the traditional grounds for such liability. For these reasons, the petition should be denied.

IV

THE ISSUES RAISED IN THIS CASE ARE NOT OF NATIONAL IMPORTANCE, NOR IS THERE ANY REAL DISAGREEMENT IN THE LOWER COURTS ON THE APPLICABLE STANDARDS.

Meyer last argues that his petition should be granted because the case is of exceptional national importance. Pet. at 17-18. As discussed above, the court of appeals followed well-established rules of vicarious liability in refusing to hold, as a matter of law, that Meyer could not be vicariously liable for the discriminatory conduct of the Triad salespersons. Certiorari should not be granted unless there are compelling reasons. Sup. Ct. R. 10. Cases that involve application of well-settled principles to a familiar situation and have little significance except to the parties are not appropriate for review by this Court. *Powell v. Nevada*, 511 U.S. 79, 114 S. Ct. 1280, 128 L.Ed.2d 1 (1994) (Thomas, J., dissenting). Although this case is of importance to the parties, it has no national significance.

Meyer's concern that "corporate real estate giants that may hire thousands of agents nationwide" will be negatively impacted by the decision of the court of appeals is misplaced. This case does not, as Meyer would have it, impose strict liability on an innocent corporate officer because of his position. It merely holds that liability may be imposed against an individual who is the *sole owner, president* and/or designated *officer/broker* of a small real estate office. Whether or not Grove Crank was in fact acting as the agent of Meyer in each of those capacities, and whether he was acting within the scope of that agency, are facts that have not yet been litigated and the record is not complete.

Amicus CAR's claim that the court of appeals' decision "threatens to precipitate much upheaval and restructuring in the real estate industry" likewise should be rejected. Amicus Brief at 4. The leading cases imposing liability on the sole owners, corporate officers and brokers of real estate firms were decided years ago. Twenty-five years ago the Sixth Circuit decided *Marr v. Rife*, 503 F.3d 735, imposing liability on the owner of a small real estate firm for the discriminatory acts of his salespersons although he was not involved. Ten years ago the Seventh Circuit decided *City of Chicago v. Matchmaker*, 982 F.2d 1086, imposing liability on the sole shareholder, chief executive officer and supervisor of a corporate real estate firm for the discriminatory acts of the corporate salespersons although he was not involved. Given the long existence of these cases, and no disagreement between the circuits on the issue, the claims of Meyer and CAR are exaggerated.

Ultimately, agency is a question for the factfinder. *Harris v. Itzhaki*, 183 F.3d at 1054; *Cabrera v. Jakabovitz*, 24 F.3d at 386. The question of fact is whether a particular defendant had the right to direct and control the actions of another with respect to the sale or rental of a dwelling or the provision of real estate brokerage services, and whether a discriminatory housing practice committed by that other person was within the scope of his authority as the employee or agent of the defendant. A finding of agency must be made based on the specific facts of the case. Each future case will have to be decided on its own facts, as will this case on remand.

In this particular case, the evidence presented by respondents supports a finding that Meyer had the right, and indeed the duty, to direct and control the corporate salespersons at Triad, and thus the court of appeals was correct in finding that respondents had alleged and presented sufficient facts to withstand Meyer's motion to dismiss and motion for summary judgment on the issue of agency.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the petition.

Respectfully submitted,

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APPENDIX

California Business & Professions Code § 10130. ***Necessity of license; complaints for violations; prosecutor***

It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the department.

The commissioner may prefer a complaint for violation of this section before any court of competent jurisdiction, and the commissioner and his counsel, deputies or assistants may assist in presenting the law or facts at the trial.

It is the duty of the district attorney of each county in this state to prosecute all violations of this section in their respective counties in which the violations occur.

(West 2002) [Effective 1969]

California Business & Professions Code § 10131. ***Real estate broker***

A real estate broker within the meaning of this part is a person who, for a compensation or in expectation of a compensation, regardless of the form or time of payment, does or negotiates to do one or more of the following acts for another or others:

(a) Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of,

solicits or obtains listings of, or negotiates the purchase, sale or exchange of real property or a business opportunity.

(b) Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase or exchanges of leases on real property, or on a business opportunity, or collects rents from real property, or improvements thereon, or from business opportunities.

(c) Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering upon, lands owned by the state or federal government.

(d) Solicits borrowers or lenders for or negotiates loans or collects payments or performs services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

(e) Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders thereof.

(West 2002) [Effective 1984]

California Business & Professions Code § 10159.2. ***Responsibility of officer in charge for performance of acts for which real estate license required***

(a) The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required.

(b) A corporate broker licensee that has procured additional licenses in accordance with Section 10158 through officers other than the officer designated pursuant to Section 10211 may, by appropriate resolution of its board of directors, assign supervisory responsibility over salespersons licensed to the corporation to its broker-officers.

(c) A certified copy of any resolution of the board of directors assigning supervisory responsibility over real estate salespersons licensed to the corporation shall be filed with the Real Estate Commissioner within five days after the adoption or modification thereof.

[West 2002) [Effective 1980]

California Business & Professions Code § 10211. ***Corporation license***

If the licensee is a corporation, the license issued to it entitles one officer thereof, on behalf of the corporation, to engage in the business of real estate broker without the payment of any further fee, such officer to be designated in the application of the corporation for a license. For each officer other than the officer so designated, through whom it engages in the business of real estate broker, the appropriate original or renewal fee is to be paid in addition to the fee paid by the corporation.

(West 2002) [Effective 1956]

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10 California Code of Regulations § 2725. ***Broker Supervision.***

A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage:

(a) Transactions requiring a real estate license.

(b) Documents which may have a material effect upon the rights or obligations of a party to the transaction.

(c) Filing, storage and maintenance of such documents.

(d) The handling of trust funds.

(e) Advertising of any service for which a license is required.

(f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination.

(g) Regular and consistent reports of licensed activities of salespersons.

The form and extent of such policies, rules, procedures and systems shall take into consideration the number of salespersons employed and the number and location of branch offices.

A broker shall establish a system for monitoring compliance with such policies, rules, procedures and systems. A broker may use the services of brokers and salespersons to assist in administering the provisions of this section so long as the broker does not relinquish overall responsibility for supervision of the acts of salespersons licensed to the broker.

(2002) [Effective 1996]
